IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 791

[redacted]

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 793

HOPE NATURAL GAS COMPANY, TEXAS GAS TRANSMISSION CORPORATION AND TEXAS EASTERN TRANSMISSION CORPORATION, *Petitioners*,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

Petitioners hereby incorporate herein by reference the reply brief filed by the Petitioners in No. 774 which, we believe, shows that review by this Court of the decision below is warranted despite the brief in opposition filed by Respondent. By way of amplification, Petitioners herein wish to emphasize the following:

1. Respondent seeks to read into this Court's *per curiam* decision in *Transco-Seaboard* an affirmative rejection of the initial prices there involved (see, e.g., Br. in Opp., p. 13). Under well-established principles, however, it is clear that this Court made no substan-

tive rulings in its decision in *Transco-Seaboard* vacating the judgment of the Third Circuit and remanding the case "with directions to remand the case to the Federal Power Commission for reconsideration and redetermination in light of" *Catco*. All this Court held in *Transco-Seaboard* was that since its *Catco* opinion was rendered after the Commission's decision in *Transco-Seaboard* it was appropriate for the Commission to reconsider *Transco-Seaboard* in light of *Catco*. In other words, this Court wished to be assured that the Commission, the agency vested with primary responsibility for issuing certificates under Section 7(c), would reach the same result in *Transco-Seaboard* in light of *Catco*.

That such action by the Court does not involve any substantive rulings is apparent from the fact that in other cases where this Court has vacated a judgment of a lower court and remanded the case for reconsideration and redetermination "in light of" a particular recent decision, such action had not been construed by either this Court or the lower tribunal to which the case was remanded as involving any substantive ruling. See, e.g., *Barenblatt* v. *United States*, 354 U.S. 930 (1957); *Barenblatt* v. *United States*, 252 F. 2d 129 (App. D.C., 1958), affirmed, 360 U.S. 109 (1959); *Uphaus* v. *Wyman*, 355 U.S. 16 (1957); *Wyman* v. *Uphaus*, 101 N.H. 139, 136 A. 2d 221 (1958), affirmed, 360 U.S. 72 (1959); *Joines* v. *United States*, 357 U.S. 573 (1958); *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3, 1958), *cert. denied*, 358 U.S. 880 (1958).

2. Respondent asserts (in its Statement of Facts at pp. 4-5) that Hope's acquisition of gas in this case will increase the costs of gas to Hope's customers and, in support thereof, it undertakes to compare the costs

of this gas with the average cost to the Consolidated System of gas purchased by it assertedly "at the very same delivery points". These assertions are factually untrue and directly contradicted by evidence in the record, which Respondent could have disputed or cross-examined, but did not, at the time that the record was being made. Not only will this gas not be delivered at the same delivery points that Consolidated receives all of its pipeline purchased gas, as shown in the reply brief in No. 774, but the Commission expressly found on the record (R. 105) that the price paid for this gas will not result in any rate increase to Hope's customers (R. 54-55, 56).

Moreover, the predicate of Respondent's assertion, i.e., that Hope's costs of this acquisition and the System's pipeline purchased gas are comparable, is erroneous. On the one hand, the System's low average cost of pipeline purchased gas is achieved by utilizing Hope to absorb substantial fluctuations in the System's needs in the course of which Hope incurs substantial additional costs for storing, transporting and handling, which costs are reflected in the spread between the cost of pipeline purchased gas and Hope's resale rates. On the other hand, Hope will not incur additional costs of comparable magnitude in connection with the instant gas. Thus, the different additional costs incurred in connection with the instant gas and pipeline purchased gas make Respondent's attempted comparison thereof like comparing apples with oranges.

Contrary to Respondent's assertion (Br. in Opp., p. 5, fn. 4), Hope's recent *rate* filing was not predicated on its acquisition of the instant gas supply. In fact, as the filing shows on its face, the increased costs upon

which the filing was based were completely unrelated to this acquisition.[1]

CONCLUSION

For these reasons as well as those set out in our Petition and the Petition and Reply Brief in No. 774, it is respectfully submitted that a petition for writ of certiorari be issued in this case.

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[1] Respondent's gratuitous insinuation that the arrangements for handling this gas within the Consolidated System were improper, is totally unwarranted. Not only had no such question ever been raised previously but it is irrelevant to the problem now before this Court. Suffice it to say that it would have been completely impractical and more costly for each of the Consolidated companies to have purchased a portion of this gas in south Louisiana and entered into separate transportation arrangements to get this gas to their various markets.